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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

9 PUBLIC EMPLOYEES FOR  
10 ENVIRONMENTAL RESPONSIBILITY  
and WILD FISH CONSERVANCY,

11 Plaintiffs,

12 v.

13 U.S. DEPARTMENT OF THE NAVY; B.J.  
14 PENN, in his official capacity as Acting  
Secretary of the Navy; U.S. FISH AND  
15 WILDLIFE SERVICE; KEN SALAZAR, in  
his official capacity as Secretary of the  
16 Interior; NATIONAL MARINE FISHERIES  
SERVICE; and OTTO J. WOLFF, in his  
17 official capacity as Acting Secretary of  
Commerce,

18 Defendants.  
19

CASE NO. C08-5552BHS

ORDER GRANTING IN PART  
DEFENDANTS' MOTION TO  
DISMISS AND STAYING  
ACTION

20 This matter comes before the Court on Defendants' motion to dismiss. Dkt. 24.  
21 The Court has considered the pleadings filed in support and in opposition to Defendants'  
22 motion and the remainder of the record, and hereby grants the motion in part, and stays  
23 the remainder of this action, for the reasons stated herein.

24 This case involves a challenge to the United States Department of the Navy's  
25 ("Navy") Explosive Ordnance Disposal ("EOD") underwater training exercises in Puget  
26 Sound, Washington. Plaintiffs Public Employees for Environmental Responsibility and  
27 Wild Fish Conservancy ("PEER") challenge the Navy's EOD exercises, alleging  
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1 violations of the National Environmental Policy Act (“NEPA”), the Endangered Species  
2 Act (“ESA”), and the Administrative Procedure Act (“APA”).

3 Defendants now move to dismiss Plaintiffs’ claims for lack of subject-matter  
4 jurisdiction, contending that the claims are moot.

## 5 **I. STATUTORY AND REGULATORY BACKGROUND**

### 6 **A. NATIONAL ENVIRONMENTAL POLICY ACT**

7 NEPA serves the dual purpose of informing agency decision-makers of the  
8 significant environmental effects of proposed major federal actions and insuring that  
9 relevant information is made available to the public so that they “may also play a role in  
10 both the decisionmaking process and the implementation of that decision.” *See Robertson*  
11 *v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To meet these dual  
12 purposes, NEPA requires that an agency prepare a comprehensive environmental impact  
13 statement (“EIS”) for “major Federal actions significantly affecting the quality of the  
14 human environment.” 42 U.S.C. § 4332(2)(C). All federal agencies must also study,  
15 develop, and describe appropriate alternatives to the recommended courses of action in  
16 any proposal which involves unresolved conflicts concerning alternative uses of available  
17 resources. *Id.* § 4332(2)(E).

18 The Council on Environmental Quality’s (“CEQ”) regulations implementing  
19 NEPA require that “environmental information . . . [be] made available to public officials  
20 and citizens before decisions are made and before actions are taken.” 40 C.F.R. §  
21 1500.1(b). If the proposed action is one which does not normally require an EIS, an  
22 agency may prepare an environmental assessment in order to determine whether an EIS is  
23 required. *Id.* § 1501.4; *id.* § 1508.9. If the agency determines, on the basis of the  
24 environmental assessment, not to prepare an EIS, it must prepare a “finding of no  
25 significant impact” and make it available to the public. *Id.* § 1504.4(e); *id.* § 1508.13.

26 If an agency does prepare an EIS, the agency typically prepares a draft EIS,  
27 followed by a comment period, and then prepares a final EIS. After the final EIS is  
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completed, the agency must issue a “record of decision” (“ROD”) describing the decision, identifying all alternatives considered and the factors that were balanced in making the decision, and stating whether all practicable means to avoid or minimize harm to the environment were adopted, and if not, why not. *Id.* 1505.2. Until the ROD is issued, the agency may not take any action that would have an adverse environmental impact or limit the choice of reasonable alternatives. *Id.* 1506.1(a).

Judicial review of agency decisions is implied under NEPA. *See Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). “It is [CEQ]’s intention that judicial review of agency compliance with [CEQ] regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury.” 40 C.F.R. § 1500.3.

## **B. ENDANGERED SPECIES ACT**

The ESA contains both substantive and procedural requirements designed to carry out the goal of conserving endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(b). The Secretary of the Interior is responsible for listed terrestrial and inland fish species and administers his responsibilities through the Fish and Wildlife Service (“FWS”). *Id.* §§ 1532(15) and 1533. The Secretary of Commerce has responsibility for listed marine species and administers ESA through the National Marine Fisheries Service (“NMFS”).

Section 9 of ESA prohibits the “take” of members of a listed species, which means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” *Id.* § 1538(a)(1)(B). Section 7(a)(2) directs an acting agency proposing an action that may affect listed species to consult with NMFS or FWS (the “consulting agency”). *Id.* § 1536(a)(2). If an acting agency determines that the proposed action is not likely to affect protected species, and the consulting agencies provide written concurrence with this

determination, the ESA consultation process is terminated. 50 C.F.R. § 402.13(a). If written concurrence is not obtained, the agency must engage in formal consultation. *See id.* § 402.14. At the conclusion of formal consultation, the consulting agency issues a biological opinion as to whether the proposed action is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. *Id.* § 1536(b); 50 C.F.R. § 402.14(h). If the proposed action is not likely to result in jeopardy but may result in the incidental “take” of members of a listed species, the biological opinion must include an incidental take statement specifying reasonable and prudent measures to minimize the take and mandatory terms and conditions to implement the reasonable and prudent measures. *See* 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(I). Any take in compliance with the terms and conditions of an incidental take statement “shall not be considered to be a prohibited taking of the species concerned.” 16 U.S.C. 1536(o)(2).

Section 11 of ESA provides that “any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.” 16 U.S.C. § 1540(g)(1)(A). No action may be commenced “prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation.” *Id.* § 1540(g)(2)(A)(i).

Challenges to actions of a consulting agency are brought under the APA, and not the ESA citizen suit provision. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

### **C. ADMINISTRATIVE PROCEDURE ACT**

The APA authorizes suit by “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702. Where no other statute provides a right of action, the “agency action” complained of must be “final agency action.” *Id.* § 704. In cases

1 involving an alleged “failure to act,” the APA authorizes suit to “compel agency action  
2 unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).

## 3 **II. FACTUAL BACKGROUND**

4 At least since the 1980s, the Navy has conducted EOD exercises in the Navy  
5 Region Northwest in Puget Sound, Washington at three locations: Crescent Harbor  
6 (Whidbey Island), Hood Canal (Floral Point), and Port Townsend Bay (Indian Island).  
7 The EOD training operations are designed to train and certify divers to dispose of  
8 underwater explosives. The EOD underwater training exercises are of two types:  
9 underwater detonations and surface or floating mine detonations. Dkt. 24 at 8. In general,  
10 each underwater exercise involves placing an inert “dummy” mine on the sea floor,  
11 locating the mine with a SCUBA diver hand-held sonar, placing a charge near the mine,  
12 attaching detonation equipment, detonating the charge, retrieving the debris, and  
13 conducting in-water inspection of the detonation site. *Id.* For surface or floating mine  
14 exercises, two swimmers attach a charge to a mine simulated by a 55-gallon metal drum  
15 floating on the surface of the water. *Id.*

16 According to PEER, several threatened and endangered species are found in the  
17 EOD training areas, including bull trout, chinook salmon, chum salmon, stellar sea lions,  
18 humpback whales, and marbled murrelets.

19 Each EOD exercise results in killing thousands of fish. A biological opinion issued  
20 by the NMFS concluded that these exercises result in the annual “take” of ESA-listed  
21 species consisting of 5,094 juvenile and 50 adult Puget Sound Chinook salmon, 1,022  
22 juvenile and 101 adult Hood Canal summer run chum salmon, and 182 juvenile and 20  
23 adult Puget Sound steelhead. Dkt. 18-2 at 60 (Incidental Take Statement). A biological  
24 opinion issued by FWS concluded that there is also “take” of endangered bull trout and  
25 marbled murrelets. Dkt. 18-4, 139-14 (Incidental Take Statement).

26 Three EOD units perform or have performed EOD training events in the Navy  
27 Region Northwest: EOD Mobile Unit Eleven (“MU-Eleven”) and two shore detachments,  
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1 EOD Detachment Northwest and EOD Detachment Bangor. Dkt. 24-2 at 4. Historically,  
2 MU-Eleven has performed the majority of EOD underwater training events in the Navy  
3 Region Northwest. The training consists of using explosive charges to destroy or disable  
4 inert mines. In the past, EOD training exercises entailed as many as three to five exercises  
5 per month. According to the Navy, MU-Eleven has conducted approximately 12 to 16  
6 EOD training exercises over the last two years, and EOD shore detachments have  
7 conducted four over the same time period. Dkt. 24, 8-9.

8 **A. NAVY’S DECISION TO RELOCATE MU-ELEVEN AND SUSPEND EOD**  
9 **EXERCISES**

10 On April 21, 2008, the Navy issued a directive providing for the relocation of MU-  
11 Eleven to Imperial Beach, California, effective June 1, 2010. Dkt. 24-3.

12 On April 30, 2009, Rear Admiral (“RDML”) James Symonds, Commander of  
13 Navy Region Northwest, signed and delivered a memorandum to MU-Eleven, informing  
14 it that MU-Eleven would be relocated to Imperial Beach, California. Dkt. 24-4.<sup>1</sup> The  
15 memorandum further informed the commander of MU-Eleven that “on April 8, 2009 your  
16 command conducted its last underwater demolition training event in Puget Sound. . . .  
17 [and] no future training will be conducted on [ranges in Puget Sound] until the Record of  
18 Decision for the Northwest Training Range Environmental Impact Statement is issued, or  
19 the Navy is able to demonstrate compliance with NEPA and the ESA through other  
20 means.” *Id.*

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23 <sup>1</sup> According to the Navy, relocating MU-Eleven to California will relieve stress on EOD  
24 personnel by reducing time away from home during training, reduce training costs, reduce costs  
25 of relocating personnel, and would locate MU-Eleven with its EOD Operational Support Unit.  
26 Dkt. 24-3. In addition, the decision to relocate the unit was based in part on a plan called the  
27 Total Force Revision, developed by the Navy EOD community in November 2006. Dkt. 24-5 at  
28 5. The purpose of this plan was to (1) consolidate all EODMUs at two locations, one in  
California and one in Virginia, (2) consolidate all EOD pre-deployment training into a “single  
12-week pipeline,” and (3) save money by consolidating facilities, training, and logistics  
functions. *Id.*

1 According to Commander (“CDR”) Joseph DiGuardo, Jr., commanding officer of  
2 MU-Eleven, although MU-Eleven unit personnel “may still have some physical presence  
3 at Naval Air Station Whidbey Island, Washington, until some time in 2010, [MU-Eleven  
4 is] no longer conducting EOD training in the Northwest” and the last EOD training event  
5 in Puget Sound took place on April 8, 2009. Dkt. 24-5, 5-6. CDR DiGuardo stated that  
6 two MU-Eleven platoons will conduct the EOD training that had been scheduled for June  
7 and July 2009 in California rather than Puget Sound. *Id.* at 6.

8 CDR DiGuardo also stated that while MU-Eleven has “performed its final EOD  
9 training event in Puget Sound,” shore detachments will remain in the Northwest Training  
10 Range Complex (“NWTRC”). *Id.* The detachment units are not scheduled to conduct any  
11 EOD underwater training events for the remainder of 2009, and “no events have been  
12 scheduled for 2010.”<sup>2</sup> *Id.* However, Defendants maintain that while no EOD training  
13 events are currently planned, training could conceivably take place before issuance of a  
14 record of decision, though such an occurrence is “highly unlikely.” Dkt. 27 at 14  
15 (Defendants’ reply).

16 During a telephonic hearing held May 14, 2009, the Court instructed the Navy to  
17 provide advance notice to PEER in the event the Navy planned to conduct EOD  
18 exercises. On May 19, 2009, Defendants wrote a letter promising PEER that the Navy  
19 agreed to

20 provide reasonable, advance notice to PEER in the unlikely event that it  
21 becomes necessary for the Navy to perform further [EOD] underwater  
22 detonation training in Puget Sound before completion of the NEPA and ESA  
23 processes and associated compliance documents for such training. . . . The  
24 Navy will continue to provide such notice for the duration of the current  
25 lawsuit. In the unlikely event that the date of the EOD underwater detonation

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26 <sup>2</sup> According to the Navy, training schedules for MU-Eleven and the two shore  
27 detachments are typically prepared annually. Dkt. 24-5 at 4. The training schedules are validated  
28 on a quarterly basis “based on the anticipated deployment schedules of the platoons being  
trained,” and taking into account “major troop surges and anticipated operational needs during  
deployment.” *Id.* Projected schedules are also “subject to change due to unforeseen  
circumstances and changes in operational requirements or commitments.” *Id.* at 5.

1 training activity would be classified, we would inform you of the general  
2 time frame within which the exercise would be conducted.

3 Dkt. 27-2.

### 4 **B. NAVY'S NEPA ACTIVITIES**

5 On October 8, 2002, PEER wrote the Navy, asking whether the Navy had made  
6 any NEPA determinations concerning EOD training exercises. On December 18, 2002,  
7 the Navy responded, and stated that "the potential impact on the environment from EOD  
8 in-water training warrants conducting NEPA." Dkt. 26 at 11 (*citing* NAV 005138, Doc.  
9 119, p.2). The Navy initially chose to prepare an environmental assessment rather than an  
10 environmental impact statement.

11 PEER summarizes the Navy's NEPA activities as follows:

12 The Navy characterized its intention in the NEPA process as  
13 "provid[ing] the proper environmental compliance documents without  
14 negatively affecting necessary EOD training operations." The Navy  
15 decided to meet this goal by characterizing the proposed action for the EA  
16 not as the EOD training itself, but as the implementation of the  
17 "Endangered Species Protection Plan" ("ESPP") which it was proposing as  
18 mitigation in connection with its ongoing ESA consultations with FWS and  
19 NMFS. Navy officials noted that: "[t]he advantage of this approach is to  
20 avoid jeopardizing EOD training in Puget Sound with the EA required No  
21 Action alternative. Therefore, the No Action alternative will be to continue  
22 the EOD program without implementing the ESPP.["] The Navy recognized  
23 the doubtful legality of this approach, stating that the proposed action was  
24 "not in the standard NEPA approach" and "[w]hether this approach is  
25 acceptable to reviewing agencies remains to be seen." The Navy selected  
26 alternatives to consider in the EA which it had already determined were  
27 logistically and financially infeasible and/or did not meet Navy training  
28 requirements. The contractor delivered a final draft of the EA on August 18,  
2004.

21 The Navy never finalized the draft EA, and later decided to include  
22 evaluation of EOD training operations in Puget Sound in the overall  
23 NWTRC EIS. The Navy has continued EOD training exercises throughout  
24 its NEPA reviews. In August 2008, after this suit was originally filed, Navy  
25 personnel considered finalizing the 2004 EA in order to meet Plaintiffs'  
26 NEPA challenge. In response, John Mosher, with Navy Environmental,  
27 stated that: "[t]he draft EA definitely had some shortcomings as it focused  
28 on the Endangered Species Protection Plan and not on the EOD operations  
themselves. At the time the EA was discontinued and the EIS was kicking  
in, it was felt that [finding of no significant impact, or FONSI] may not be  
possible (the agencies were using pretty strong language.) He stated that  
even if the NMFS and FWS [biological opinions] now supported FONSI, it  
would not be possible to quickly take the draft EA to final, as major  
revisions would be needed, and other issues including tribal concerns and  
additional species being listed under the ESA would have to be considered.

1 Dkt. 26 at 12 (Plaintiffs' response) (Plaintiffs' numbering of statements and citations to  
2 record omitted).

3 On July 31, 2007, the Navy initiated the scoping process for the preparation of an  
4 EIS for its activities in the NWTRC, including its EOD training exercises. Dkt. 24 at 10  
5 (*citing* Notice of Intent to Prepare EIS, 72 Fed. Reg. 41712 (July 31, 2007)). This EIS  
6 notes that MU-Eleven will relocate to California, and that two shore detachments will  
7 remain in the NWTRC and will conduct up to four exercises per year. *Id.* The Navy  
8 maintains that in conjunction with the ongoing NEPA process, it is engaged in further  
9 ESA consultation with FWS and NMFS regarding training activities that will occur in the  
10 NWTRC after December 31, 2009. *Id.* at 11. The Navy maintains that it expects that the  
11 NWTRC Final EIS will be completed by the end of 2009, and that the Navy will  
12 subsequently issue an ROD for its training activities in the NWTRC. *Id.*

13 The Navy continued EOD training exercises throughout its NEPA process, until it  
14 ceased training exercises in April 2009.

### 15 **C. NAVY'S ESA CONSULTATIONS**

16 In 1999, NMFS listed two salmon species as threatened under the ESA. On  
17 December 28, 2000, the Navy prepared a Biological Assessment, which noted that several  
18 listed species inhabited the area. The Navy requested concurrence from NMFS and FWS  
19 with the Navy's determination that EOD training exercises were not likely to adversely  
20 affect certain protected species. NMFS and FWS did not adopt the Navy's determination,  
21 thereby requiring the Navy to undergo formal consultation.

22 On June 30, 2008, NMFS issued a biological opinion. NMFS concluded that the  
23 EOD exercises were not likely to jeopardize the continued existence of the Puget Sound  
24 Chinook salmon, Hood Canal summer-run chum salmon, Puget Sound steelhead, or  
25 southern resident killer whales. Dkt. 18-2. The biological opinion included an ITS  
26 authorizing incidental take during EOD training exercises in Puget Sound. Dkt. 18-3. On  
27 September 16, 2008, NMFS wrote the Navy a letter in response to a request for  
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1 consultation. NMFS concluded that the EOD exercises were not likely to adversely affect  
2 Stellar sea lions or humpback whales. *Id.*

3 On November 7, 2008, FWS issued a biological opinion, concluding that the  
4 Navy's EOD training was not likely to jeopardize the continued existence of marbled  
5 murrelet and bull trout. Dkt. 18-4. The FWS biological opinion included an ITS  
6 authorizing incidental take during EOD training exercises. *Id.*

7 During the time consultation took place between the Navy, NMFS, and FWS, the  
8 Navy's EOD training exercises continued.

9 On July 28, 2008, PEER sent a 60-day notice of intent to sue to the Navy, NMFS,  
10 and FWS. Dkt. 4-2 (Exhibit 3). PEER notified Defendants of its allegations that the Navy  
11 was violating ESA Section 7(a)(2) by conducting EOD training exercises without having  
12 first completed consultation, and that the Navy was violating ESA Section 9(a) by taking  
13 listed species without an ITS. *Id.* at 12.

### 14 **III. PLAINTIFFS' LAWSUIT**

15 On September 16, 2008, PEER filed a complaint. Dkt. 1. On October 24, 2008,  
16 PEER filed an amended complaint. Dkt. 4. PEER asserts five claims against Defendants:  
17 (1) the Navy is in violation of NEPA for failing to conduct any of the required analyses  
18 for its EOD training exercises; (2) the Navy is in violation of section 7 of ESA, 16 U.S.C.  
19 § 1536, for failing to ensure, in consultation with FWS and NMFS, that its EOD training  
20 exercises are not likely to jeopardize the continued existence of protected species; (3) the  
21 Navy is in violation of section 9 of ESA, 16 U.S.C. § 1538, for continuing to "take"  
22 protected species without a valid incidental take statement; (4) FWS and NMFS have  
23 unlawfully withheld agency action<sup>3</sup>; and (5) certain final agency actions taken by NMFS  
24 regarding EOD training exercises are arbitrary, capricious, an abuse of discretion, are not  
25 in accordance with law, and are reviewable under the APA, 5 U.S.C. § 706. Dkt. 4. PEER

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27 <sup>3</sup>Plaintiffs concede that Count 4 is now moot. Dkt. 26 at 3 (Plaintiffs' response).  
28 Accordingly, this claim is dismissed.

1 moves the Court to issue an injunction prohibiting EOD training exercises until the Navy  
2 complies with NEPA and ESA, as well as a declaratory judgment that the Navy has  
3 violated the requirements of the statutes cited in Counts 1 through 5. *Id.*, 21-23. PEER  
4 also moves for an award of reasonable litigation expenses as allowed by the Equal Access  
5 to Justice Act, 28 U.S.C. §§ 2412, *et seq.* *Id.* at 23.

6 On May 7, 2009, Defendants filed a motion to dismiss. Dkt. 24. Defendants  
7 maintain that “the Navy’s decision to cease all EOD underwater training exercises within  
8 the NWTRC until the completion of subsequent NEPA and ESA processes removes the  
9 bases for PEER’s claims and, therefore, the case should be dismissed as moot.” *Id.* at 14.  
10 Defendants further maintain that Counts 2-4 should be dismissed because “superceding  
11 ESA documents have already issued which moot PEER’s claims, PEER did not provide  
12 the requisite notice of certain alleged ESA violations 60 days in advance of filing suit,  
13 and PEER has failed to state a viable ESA § 9 claim against the Navy.” *Id.*

14 On May 26, 2009, Plaintiffs filed a response, opposing Defendants’ motion to  
15 dismiss Counts 1, 2, 3, and 5. Dkt. 26. First, Plaintiffs contend that Defendants cannot  
16 meet their burden of demonstrating “that the Navy’s supposed voluntary cessation of  
17 illegal conduct moots the case.” *Id.* at 3. Second, Plaintiffs maintain that “Defendants’  
18 argument that PEER failed to provide adequate notice of its intent to pursue counts 2 and  
19 3 is misguided and conflates the two distinct legal obligations imposed by section 7(a)(2)  
20 of ESA, 16 U.S.C. § 1538.” *Id.* Third, Plaintiffs maintain that its claim alleging the Navy  
21 violated Section 9 of the ESA, 16 U.S.C. § 1538, states a cognizable claim because there  
22 is not an incidental take statement for all the protected species potentially harmed, and  
23 Plaintiffs’ challenge extends to the NMFS incidental take statement. *Id.*

24 On May 29, 2009, Defendants filed a reply. Dkt. 27. On June 18, 2009, the Court  
25 granted PEER leave to file a surreply. Dkt. 30; Dkt. 31 (Plaintiffs’ surreply).

## IV. DISCUSSION

### A. LEGAL STANDARDS

#### 1. Motion to Dismiss under Rule 12(b)(1)

A complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(1) if, considering the factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not one described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v. Tinnerman*, 626 F. Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal question jurisdiction) *and* 1346 (United States as a defendant). When considering a motion to dismiss pursuant to Rule 12(b)(1), the court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983).

#### 2. Motion to Dismiss under Rule 12(b)(6)

Rule 12(b)(6) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the

1 speculative level, on the assumption that all the allegations in the complaint are true (even  
2 if doubtful in fact)." *Id.* at 1965. Plaintiffs must allege "enough facts to state a claim to  
3 relief that is plausible on its face." *Id.* at 1974.

### 4           **3.       Standard for Mootness**

5           A case becomes moot whenever it loses "its character as a present, live  
6 controversy of the kind that must exist if [courts] are to avoid advisory opinions on  
7 abstract propositions of law." *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir.  
8 2001) (*quoting Hall v. Beals*, 396 U.S. 45, 48 (1969)). However, a defendant's voluntary  
9 cessation of allegedly wrongful behavior does not make a case moot unless events make  
10 "absolutely clear" that the challenged activities cannot reasonably be expected to recur.  
11 *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167, 193 (2000), *see*  
12 *also City News & Novelty v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) ("Mootness  
13 doctrine . . . protects plaintiffs from defendants who seek to evade sanction by predictable  
14 'protestations of repentance and reform.'") (citation omitted).

15           In the Ninth Circuit, defendants in NEPA cases face "a particularly heavy burden  
16 in establishing mootness." *Cantrell*, 241 F.3d at 678. A NEPA defendant does not  
17 necessarily establish mootness simply by demonstrating that the challenged project has  
18 been completed or that the challenged act has ceased. *See id.* If that were case, a NEPA  
19 defendant "could merely ignore the requirements of NEPA" and complete the challenged  
20 project or act and then "hide behind the mootness doctrine." *See id.* In deciding whether a  
21 claim has become moot, "the question is not whether the precise relief sought at the time  
22 the application for an injunction was filed is still available. The question is whether there  
23 can be any effective relief." *Id.* (citation omitted). Similarly, when a plaintiff seeks  
24 declaratory relief, the question is whether any "meaningful relief" is available. *Ctr. for*  
25 *Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007).

### 26           **4.       Stay**

27           A district court has inherent power to control the disposition of the  
28 causes on its docket in a manner which will promote economy of time and

1 effort for itself, for counsel, and for litigants. The exertion of this power  
2 calls for the exercise of a sound discretion. Where it is proposed that a  
3 pending proceeding be stayed, the competing interests which will be  
4 affected by the granting or refusal to grant a stay must be weighed. Among  
5 these competing interests are the possible damage which may result from  
6 the granting of a stay, the hardship or inequity which a party may suffer in  
7 being required to go forward, and the orderly course of justice measured in  
8 terms of the simplifying or complicating of issues, proof, and questions of  
9 law which could be expected to result from a stay.

10 *CMAX, Inc. v. Hall*, 300 F.2d 235, 268 (9th Cir. 1962).

11 A district court may stay proceedings pending resolution of independent  
12 proceedings which bear upon the case, whether those proceedings are judicial,  
13 administrative, or arbitral in character. *Mediterranean Enterprises, Inc. v. Ssangyong*  
14 *Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983). This rule does not require that the issues in  
15 such proceedings are necessarily controlling on the action before the court. *Id.*

## 16 **B. PEER'S CLAIMS**

17 Defendants maintain that PEER's claims are moot because PEER cannot point to  
18 any potential injury that could occur, and argue that the potential for environmental  
19 damage alleged by PEER no longer exists because EOD training exercises have been  
20 halted pending further review. Defendants further maintain that the alleged procedural  
21 harms no longer exist because the Navy has issued a draft EIS for the NWTRC and  
22 requested comments from the public on the analyses in the draft EIS. Therefore,  
23 Defendants argue, PEER's allegations of harm due to the alleged failure of the Navy to  
24 provide information to PEER and to involve the public in the NEPA process are no longer  
25 factually accurate. Finally, Defendants contend that no effective relief is available to  
26 PEER, and that no exceptions to the mootness doctrine apply.

27 PEER counters that the Navy's own assurances that it will not resume EOD  
28 training does not make it "absolutely clear" that the training events will not recur,  
especially because Defendants have never admitted that the training events occurred in  
violation of NEPA and ESA. In addition, PEER contends that the Navy's claim that the  
alleged wrongful conduct is not likely to recur is undermined by at least two additional

1 factors: (1) the Navy has admitted that the move of MU-Eleven is not complete and that  
2 shore detachments will remain in the NWTRC region, and (2) the Navy has not provided  
3 evidence of NEPA or ESA compliance for EOD training activities that are planned to  
4 occur in the San Diego area after MU-Eleven is transferred.

5 Finally, PEER contends that its claims are not moot because, even assuming the  
6 training activities have ceased, effective relief is still available. Specifically, PEER  
7 maintains that the Navy previously agreed to restoration activities to enhance salmonoid  
8 and forage fish production around Crescent Harbor, Whidbey Island, by restoring a  
9 former salt marsh and intertidal beach habitat, as mitigation for the damage EOD training  
10 does to those fish populations. PEER argues that these activities, along with other  
11 mitigation measures may be appropriate to remedy harm caused by past EOD training  
12 exercises.

13 In addition to its argument that PEER's claims are moot, Defendants alternatively  
14 move the Court to stay the proceedings pending the issuance of the NWTRC record of  
15 decision:

16 A stay is appropriate because the exercises challenged in [PEER's  
17 first amended complaint] are no longer occurring, and no future exercises  
18 are planned. Moreover, pursuant to the Court's instructions during the May  
19 14, 2009 hearing, the Navy has committed to notifying PEER in the highly  
20 unlikely event that a training exercise is scheduled in Puget Sound prior to  
21 the issuance of the ROD. . . . Therefore, PEER will have an opportunity to  
22 seek relief if an exercise is scheduled to occur before the completion of  
23 further NEPA and ESA processes. In these circumstances, the interests of  
24 judicial economy would not be served and the resources of the parties and  
25 the court would not be well spent by litigating the legality of historical  
26 exercises or unplanned future exercises, which will be covered by new  
27 environmental compliance documents.

28 Dkt. 27 at 14.

PEER opposes a stay. First, PEER argues that the Court should not consider  
Defendants' alternative request for a stay because Defendants did not raise this issue in  
their motion to dismiss. Second, PEER argues that granting a stay "would totally  
eviscerate the exception to mootness for voluntary cessation" by allowing Defendants to  
receive "essentially the same relief as if the case was moot despite the fact that the

1 voluntary cessation doctrine would direct that the case be decided on the merits.” Dkt. 31  
2 at 4 (PEER’s surreply). PEER further maintains that it is entitled to the Court’s  
3 determination concerning the Navy’s legal obligations under NEPA and ESA, “and a  
4 court order preventing future illegal activity.” *Id.* at 5. Finally, PEER contends that  
5 Defendants have not met their burden in demonstrating that a stay is warranted. PEER  
6 maintains that it would be prejudiced by a stay because it would be denied timely  
7 resolution of its claims.

8 Without reaching the issue of whether Defendants have met their burden in  
9 demonstrating mootness as to any of PEER’s claims, the Court concludes that this action  
10 should be stayed pending the Navy’s completion of the NEPA processes and renewed  
11 ESA consultation. Addressing the Navy’s mootness arguments is not proper because the  
12 Navy has indicated that it may resume training after completing the NEPA and ESA  
13 processes, and possibly, though unlikely, before completion. Staying this case will also  
14 alleviate PEER’s concerns that the Navy is “hiding behind” the mootness doctrine by  
15 ceasing the EOD exercises, only to return to the challenged activities once this case is  
16 dismissed.<sup>4</sup>

17 This case should be stayed because it would be premature to consider PEER’s  
18 claims for injunctive relief. For purposes of issuing a stay, Defendants have sufficiently  
19 demonstrated that it is unlikely that the challenged training events will recur before the  
20 Navy has completed the NEPA process and renewed ESA consultations. Navy command

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21  
22 <sup>4</sup> Assuming, *arguendo*, that it was “absolutely clear” that the Navy’s training exercises  
23 cannot reasonably be expected to recur, the Court should still reserve ruling as to whether any  
24 “effective relief is available.” For example, as PEER argues, the current NMFS biological  
25 opinion requires the Navy to conduct certain marsh restoration projects. Defendants state that the  
26 Navy intends to comply with this requirement, but only “as long as [the current NMFS biological  
27 opinion] is in effect.” Dkt. 27 at 8 n. 5. Even if completion of the Navy’s NEPA process and  
28 ESA consultation renders PEER’s *current* requested injunctive and declaratory relief moot, the  
Court finds it appropriate to stay the determination of whether any effective relief (such as marsh  
restoration) is available until after the Navy has completed these processes. *See Gordon, infra* at  
15 n. 5. It would be premature to address this issue, as remedial issues for past or future harms  
may be addressed during these environmental review processes.

1 has ordered these training exercises halted pending completion of the NEPA and ESA  
2 processes, and no EOD exercises are scheduled for the remainder of 2009 or for 2010. In  
3 addition, MU-Eleven, the training unit which conducted the majority of the EOD  
4 exercises in Puget Sound, is in the process of being relocated to California. While PEER  
5 argues that MU-Eleven personnel remain in the Puget Sound area, the Court notes that the  
6 MU-Eleven held, or intends to hold, its scheduled June and July 2009 training in  
7 California rather than Puget Sound. Finally, per this Court's instructions, the Navy has  
8 promised to provide advance notice to PEER in the "unlikely" event the Navy conducts  
9 EOD exercises before completion of the NEPA and ESA processes. Such notice would  
10 afford PEER the opportunity to move to lift the stay, and file a motion for temporary  
11 restraining order or preliminary injunction.

12 It would also be premature to consider PEER's claims for declaratory relief. At  
13 this time, the Court could not adequately determine the Navy's legal obligations because  
14 the Navy is currently engaged in the NEPA process and renewed ESA consultation. The  
15 decision to move MU-Eleven may result in significantly reduced training operations in  
16 Puget Sound, which may in turn alter the impact of the training on the environment and  
17 natural resources. It also would not be proper to address PEER's claims for declaratory  
18 relief based on past NEPA violations. *See Jicarilla Apache Tribe of Indians v. Morton*,  
19 471 F.2d 1275, 1283-84 (9th Cir. 1973) (a judgment declaring past noncompliance with  
20 NEPA would serve no practical purpose).<sup>5</sup>

21 PEER also raises objections to the "yet-complete" NEPA process in its  
22 response. Dkt. 26, 17-18. However, these issues are not yet ripe for judicial review. *See*  
23 *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). Because the Navy has halted  
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25 <sup>5</sup> In their reply, Defendants maintain that the ESA citizen suit provision does not permit  
26 declaratory relief for PEER's ESA claims. Dkt. 27 at 7 n. 4 (*citing Ctr. for Biological Diversity*  
27 *v. Marina Point Dev. Co.*, 566 F.3d 794, 804 (9th Cir. 2009)) ("The ESA allows a citizen suit for  
28 the purpose of obtaining injunctive relief only."). PEER did not have an opportunity to address  
this argument, but may do so after the stay is lifted.

1 EOD operations pending the completion of the environmental review processes, delayed  
2 judicial intervention would not cause PEER significant hardship. *Id.* at 733. In addition,  
3 because the Navy has not yet issued its ROD, the Court concludes that it is premature to  
4 intervene because the Navy could conceivably make changes to the draft EIS and address  
5 PEER's concerns. After the Navy has completed the NEPA and ESA processes, PEER  
6 may choose to pursue its claims against Defendants.

7 With regard to the Navy's future EOD operations in California, PEER has not  
8 demonstrated that it has standing to challenge the Navy's California operations, or that  
9 venue would be proper in this Court.

10 The Court recognizes PEER's concerns that granting a stay prejudices PEER by  
11 depriving it of timely resolution of its claims. The Court also agrees that the Navy would  
12 not endure undue hardship if this action was not stayed. However, the Court concludes  
13 that the interests of the orderly course of justice and judicial economy outweigh any  
14 prejudice to PEER. *See CMAX, supra*. In light of the Navy's ceasing of EOD training  
15 events, its relocating of MU-Eleven to California, and its continuation of the NEPA  
16 process and initiation of renewed ESA consultations, the Court concludes that the NEPA  
17 and ESA processes may significantly bear upon this case. In addition, PEER has not  
18 identified any immediate need for remediation; therefore, staying the determination of  
19 whether PEER is entitled to any relief will not cause it undue prejudice.

20 The Court also recognizes PEER's concern that staying this case could "eviscerate  
21 the exception" to the mootness doctrine by allowing Defendants to obtain the same relief  
22 as if the case were determined moot. However, the Court is not granting Defendants an  
23 indefinite stay; rather, this case is stayed until February 1, 2010, to permit Defendants  
24 time to complete their environmental review processes.

25 Finally, the Court concludes that a stay is proper despite the fact that Defendants  
26 should have included their alternative request for a stay in their motion, rather than  
27 raising this request for the first time in their reply. PEER was afforded the opportunity to  
28

1 address this issue, as the Court considered its surrply. Additionally, the Court may stay a  
2 case *sua sponte* if appropriate.

3 Accordingly, PEER's claims in Counts 1, 2, 3, and 5 are stayed until February 1,  
4 2010.<sup>6</sup> The Navy indicated that it intends to complete NEPA review by the end of 2009,  
5 and issue a record of decision 30 days after completion of the review. The parties may  
6 move the Court to extend or shorten the date for lifting the stay as circumstances warrant.

### 7 **C. NOTICE OF RESUMPTION OF EOD TRAINING EXERCISES**

8 The Court is issuing this stay in significant part because of the Navy's  
9 representations that it does not intend to conduct EOD training exercises in the NWTRC  
10 until completion of the environmental review processes, and that if it is necessary to  
11 resume the exercises, it will not proceed without providing adequate advance notice to  
12 PEER. Accordingly, the Navy is ordered to provide such notice in the event it intends to  
13 resume EOD training exercises in the NWTRC region to allow PEER time to apply to the  
14 Court for injunctive relief before such training operations will be undertaken.

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16 <sup>6</sup> Defendants maintain that Count 2 is moot because the Navy has now completed ESA  
17 Section 7 consultation. Defendants further maintain that PEER's allegation that the Navy  
18 violated Section 7 by relying on an "inadequate" biological opinion because PEER failed to  
19 include this allegation in its 60-day notice. PEER acknowledges the Navy's completion of its  
20 consultation duties, but maintains that Defendants misconstrue the other allegation included in  
21 Count 2. PEER maintains that it is not alleging that the Navy violated ESA by relying on an  
22 inadequate biological opinion. Rather, PEER maintains that the Navy continues to fail to  
23 implement adequate mitigation measures to ensure that EOD training exercises will not  
24 jeopardize continued existence of protected species – "only now those inadequate measures are  
25 embodied in the NMFS BiOp." The Court concludes that Count 2 should be stayed in light of the  
26 Navy's representations that it is now engaged in renewed ESA consultations. The Court will also  
27 reserve ruling on Defendants' argument that PEER failed to raise the "inadequate mitigation  
28 measures" argument in its 60-day notice. However, the Court notes that, in the event any of  
PEER's claims are later found to no longer present a "live controversy," the Court must  
determine whether any meaningful relief is available. Under such circumstances, PEER would  
not be required "to have asked for the precise form of relief that the district court may ultimately  
grant." *Nw. Env. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988).

26 The Court further notes that Count 3 is stayed because the Navy is engaged in further  
27 ESA consultations. As a result, it is not clear that the Navy will be operating under the current  
28 ITS during future training exercises. In addition, PEER may seek to again challenge the  
consulting agencies' issuance of the biological opinions and incidental take statements.

1 **V. ORDER**

2 Therefore, it is hereby **ORDERED** that

3 Defendant's motion to dismiss (Dkt. 24) is **GRANTED in part**, and Plaintiffs'  
4 claim in Count 4, that FWS and NMFS have unlawfully withheld agency action, is  
5 **DISMISSED**.

6 It is further **ORDERED** that the remainder of this action is **STAYED** until  
7 February 1, 2010. Plaintiffs and Defendants are ordered to file a status report with the  
8 Court on or before February 1, 2010.

9 It is further **ORDERED** that the Navy provide reasonable, advance notice to  
10 Plaintiffs in the event the Navy intends to resume EOD training exercises.

11 DATED this 17<sup>th</sup> day of July, 2009.

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13 BENJAMIN H. SETTLE  
14 United States District Judge  
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